No. 93-1835

(2)

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

1605 BOOK CENTER, INC.,

Petitioner,

against

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK and COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION FOR RESPONDENT COMMISSIONER OF TAXATION AND FINANCE

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Question Presented

Does the decision by the New York State Court of Appeals in the instant matter, holding that the operator of an adult entertainment establishment had failed to make a showing that the State's decision to tax its live entertainment booths as a "place of amusement" was motivated by a discriminatory purpose or had a discriminatory effect or was otherwise an instance of selective enforcement, provide cause for this Court to alter the current standard of review of selective enforcement claims?

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Brief in Opposition for Respondent Commissioner of Taxation and Finance

Opinions Below

The opinion of the New York State Court of Appeals (Pet. App. 1-8)[1] is reported at 83 NY2d 240, 609 NYS2d 144 (1994). The opinion of the New York State Appellate Division, Third Department (Pet. App. 9-14) is reported at 188 AD2d 694, 590 NYS2d 591 (3d Dept. 1993).

[1] "Pet. App." refers to the appendix to the petition in No. 93-1835.

Jurisdiction

The judgment of the New York State Court of Appeals was entered on February 15, 1994. The petition for a writ of certiorari was filed on May 16, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Statement

Petitioner 1605 Book Center, Inc. ("Book Center") formerly conducted a business in Times Square, New York, which included the operation of live, sexually explicit "peep shows" in booths located on its premises. In July 1980, following an audit, the Division of Taxation of the New York State Department of Taxation and Finance assessed various taxes owed by petitioner for the period March 1, 1976 through August 31, 1979, including sales tax on admissions fees for use of petitioner's live peep show booths. Petitioner challenged the assessment on various grounds, including a claim that petitioner had been subjected to selective enforcement of the tax law.

Following a hearing, an administrative law judge of the New York State Department of Taxation and Finance, Division of Tax Appeals, struck down portions of the assessment against petitioner on various grounds, but sustained the assessment of sales taxes on revenues derived from petitioner's live peep show booths (Pet. App. 48-79). The administrative law judge found that petitioner's live entertainment booths were a "place of amusement" whose admissions fees were subject to taxation under the New York State sales tax statute. Pet. App. 72-76; New York Tax Law §§ 1101(d)(10), 1105(f)(1). The administrative law

judge rejected petitioner's selective enforcement claim, noting that petitioner had not established that the audit was conducted to harass petitioner or interfere with its business (Pet. App. 78).

The administrative law judge's ruling, including her rejection of petitioner's selective enforcement argument, were upheld upon administrative review by the New York State Tax Appeals Tribunal (Pet. App. 15-47).

The Tribunal's determination was subsequently confirmed by the New York State Supreme Court, Appellate Division, Third Department (Pet. App. 9-14). Rejecting petitioner's argument that it had made out a claim of selective enforcement sufficient to warrant a hearing on that issue under State law, the Appellate Division observed (Pet. App. 13):

> Despite petitioner's contentions otherwise, the hearsay and conclusory evidence offered by petitioner is insufficient to make out a prima facie showing that petitioner was a victim of selective enforcement by respondents and, therefore, no hearing is required (*see, Matter of Feigman v. Klepak*, 62 AD2d 816, 819 [1st Dept. 1978]).

On appeal, the New York State Court of Appeals affirmed the Appellate Division's judgment in its entirety (Pet. App. 1-8).

Petitioner subsequently filed a petition for a writ of certiorari to this Court.

Argument

Petitioner has failed to present factual or legal grounds warranting this Court's revisitation of the standard of review of selective enforcement claims.

The decision of the New York State Court of Appeals is consistent with this Court's decisions, does not conflict with the decision of any other state or federal court, and does not improperly impinge on petitioner's freedom of expression under the First Amendment of the United States Constitution. Consequently, the petition for a writ of certiorari should be denied.

It is well-accepted that a claim of selective prosecution or selective enforcement of the laws should be judged according to ordinary equal protection standards. *Wayte v United States*, 470 US 598, 608 (1985). Pursuant to those standards, the party seeking to make such a claim must demonstrate both that the challenged enforcement scheme had a discriminatory effect and that it was motivated by a discriminatory purpose. *Id.* These standards are applicable not only in criminal prosecutions, but also in the application of civil laws and acts. *See, e.g., Personnel Administrator of Massachusetts v Feeney*, 442 US 256 (1979) (Massachusetts veterans' preference statute); *Village of Arlington Heights v Metropolitan Housing Development Corp.*, 429 US 252 (1977) (village rezoning decision). As the New York State Court of Appeals noted in *Matter of 303 West 42nd Street Corporation v Klein*, 46 NY2d 686, 693 (1979), the motivations behind enforcement of civil statutes are largely guided by considerations akin to those in criminal enforcement and enjoy analogous presumptions of good faith :

> The burden of proving a claim of discriminatory enforcement is a weighty one. Common sense and public policy dictate that it be so. The presumption is that the enforcement of laws is undertaken in good faith and without discrimination (see, e.g., *United States v Falk*, 479 F2d 616, 620). Moreover, latitude must be accorded authorities charged with making decisions related to legitimate law enforcement interests, at times permitting them to proceed with an unequal hand.

As the Court of Appeals noted in *Klein*, limitations in administrative resources, efforts at deterring misconduct by others, decisions to pursue test cases, and a host of other legitimate considerations may motivate decisions about whether to prosecute one action or another. 46 NY2d at 694-695.

The instant matter presents neither facts nor legal theory which warrant an alteration of these standards. In this case, petitioner failed to present convincing evidence of either improper discriminatory motivation or discriminatory impact in the application of the New York State sales tax upon its booths. It failed to demonstrate that booths comparable to its own were in use by industries other than the adult entertainment industry. It failed to show even that live adult entertainment booths operated outside the Times Square area. Most significantly, it failed to show that the New York State Department of Taxation and Finance at any time demonstrated improper discriminatory motivation in its taxation of petitioner's booths. The evidence presented at the hearing in support of petitioner's selective enforcement claim consisted entirely of unsupported allegations, hearsay and innuendo, and recitation of past instances of selective

enforcement against other businesses in Time Squares by New York City officials with no connection to State taxing authorities. Consequently, petitioner's claim that this matter presents a "shocking . . . case of selective enforcement of a tax" (Pet. 3) is rank hyperbole; its proposal of a new standard of constitutional review in cases "involving the selective enforcement of a tax against a business engaged in free speech activities protected by the First Amendment" (Pet. 11) is nothing more than an effort to alter the law to amend the factual insufficiencies of its case.

Petitioner's reliance on the testimony of psychologist Charles Winick and attorney Ralph Schwarz and the affirmation of accountant Irving Adlerstein (Pet. 5-9) to demonstrate selective enforcement was simply unfounded. Winick's conclusion that the tax assessment against petitioner was an instance of selective enforcement was sheer speculation derived from evidence of improperly motivated acts against other establishments by other public agencies between 1973 and 1980. Winick's recollection of comments by unidentified interview subjects and his informal, unwritten and undated telephone assessment of tax treatment of peep show booths at unnamed establishments in upstate New York at the request of petitioner's counsel posed no persuasive basis for the charge of selective enforcement against the Department of Taxation and Finance. Neither Winick nor any other witness established at the hearing that live peep show booths were in use in areas outside New York City, or that any private booth arrangement comparable to that of petitioner was in use for other entertainment purposes. Thus, contrary to its assertions (Pet. 16), petitioner failed to establish that it was being treated in a manner different from similarly situated taxpayers.

Likewise, the affirmation of accountant Irving Adlerstein (Pet. 5) amounted to nothing more than a vague recollection of a conversation with a tax employee which had occurred more than a decade earlier. As described in that affirmation (R99-R100):[2]

> 3. Some time during the early audit period (1976-1979) of either 1605 Book Center, Inc. or 303 West 42nd Street—the exact time I am unable to fix—I spoke with an examiner working with the New York State Department of Taxation and Finance, Miguel Cruz. On that occasion, he indicated to me that he did not believe the various forms of entertainment conducted by these enterprises were subject to a sales tax. [H]e went on to say that there was a major drive on to "get these busi- nesses." [sic] He said that the City was "pushing to make cases against" the adult entertainment businesses in the Times Square area. He said there had been a "sudden change of policy" concerning these places. I cannot say those were the exact words he used, but in substance he conveyed to me the idea that the City was going after the sex-oriented entertainment establishments in Manhattan.

Adlerstein's affidavit indicates that he was unable to recall the time of the purported conversation or—quotation marks notwithstanding—the words allegedly spoken by Mr. Cruz. Indeed, Adlerstein failed even to assert that petitioner was the subject of audit at the time of the conversation, or that petitioner itself was a target of selective enforcement,

[2]Numbers in parentheses preceded by "R" refer to pages of the Record on Appeal filed with the New York State Court of Appeals.

or that the "change of policy" purportedly described by Cruz involved the New York State Department of Taxation and Finance. Moreover, neither Adlerstein nor Cruz, who had meanwhile left the employ of the Department, were called to testify at the hearing.

The testimony of Ralph Schwarz (Pet. 7-9), an attorney who represents adult entertainment establishments in Times Square, was similarly speculative and unfounded upon direct knowledge or experience of the circumstances of the instant matter. None of the actions described by Schwarz as part of a purported "harassment campaign conducted by the City of New York" (Pet. 8) were directed at petitioner. More significantly, none of the municipal authorities involved in that purported campaign included New York City or New York State taxing authorities.

In light of this evidence, petitioner's claim of selective enforcement is specious and was properly rejected by the courts and administrative reviewers below. Petitioner's assertions that "the only businesses assessed with this sales tax were those of the petitioner, and its related companies" (Pet. 16), or that petitioner was "the only establishment being subjected to the sales tax" (Pet. 19), were undemonstrated at the hearing and are simply false. Its reference to the so-called "'hearsay' grounds for dismissing [its] claim" (Pet. 19) mischaracterizes the decision of the Appellate Division: that court did not reject petitioner's hearsay evidence, but rather found that the evidence was insufficient to make a case of selective enforcement (Pet. App. 13).

For similar reasons, petitioner's suggestion that this Court should shift the burden of demonstrating selective enforcement of the law in noncriminal cases in accordance

with a new rule proposed by petitioner is meretricious.[3] Petitioner appears to concede that the findings of the administrative reviewers and courts below were proper under current review standards. Nevertheless, it has urged this Court to review this matter on the theory that, because petitioner presented a "substantial claim of selective enforcement" in this matter (Pet. 19), this case demonstrate flaws in current review standards (Pet. 17-18). Petitioner has urged the Court to adopt a standard by which a mere "colorable" claim would shift the burden of proof to the state to establish an absence of "invidious discrimination" (Pet. 12).

Since, as we have shown, not even a colorable claim has been made out, the proposal is not even relevant here. In any event, petitioner's proposed standard constitutes an ill-advised departure from current practice and ignores the significant public purposes served by the presumption of good faith and the latitude afforded to public authorities in the enforcement of both civil and criminal laws.[4] *See, Wayte v United States*, 470 US 598, 606(1985); *Matter of 303 West 42nd Street Corporation v Klein*, 46 NY2d 686, 693 (1979). Moreover, petitioner has not demonstrated that the current standard of review fails to offer relief to those with meritorious claims.

The New York State Court of Appeals' decision that admissions fees to petitioner's live peep show booths were

[3]Pursuant to the rule proposed by petitioner (Pet. 12):

> [W]hen a person makes a colorable claim, in a noncriminal case, that a tax, or other law, is being selectively enforced in a way that impinges on the exercise of free speech, then the state bears the burden of establishing no invidious discrimination.

[4]We see no need to address petitioner's improbable suggestion that constitutional protection against selective enforcement afforded to taxpayers should exceed the protection against selective enforcement afforded to criminal defendants (Pet. 15-16).

subject to sales tax was well-founded and correct, poses no burden on petitioner's (or its clients') First Amendment freedoms, and provides no basis for a change in the standard of review of selective enforcement claims. In light of its failure to provide any evidence that State taxing authorities were in any way involved in selective enforcement action in the Times Square area or that petitioner was itself the target of selective enforcement action, the petition for a writ of certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: Albany, New York
June 3, 1994

Respectfully submitted,

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